

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

ORIGINAL



22
ETING ITEM
CEIVED

BRIAN C. McNEIL
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

2002 AUG -1 A 10: 14

AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: August 1, 2002

DOCKET NO: T-04014A-01-0340

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Philip J. Dion III. The recommendation has been filed in the form of an Opinion and Order on:

KMC DATA, L.L.C.
(CC&N/FACILITIES-BASED)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

AUGUST 12, 2002

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

AUGUST 20 AND 21, 2002

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

Arizona Corporation Commission

DOCKETED

AUG 01 2002

DOCKETED BY	CAR
-------------	-----

BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL
CHAIRMAN

3 JIM IRVIN
COMMISSIONER

4 MARC SPITZER
COMMISSIONER

5
6 IN THE MATTER OF THE APPLICATION OF
7 KMC DATA, L.L.C. FOR A CERTIFICATE OF
8 CONVENIENCE AND NECESSITY TO PROVIDE
9 FACILITIES-BASED AND RESOLD LOCAL
10 EXCHANGE ACCESS, AND RESOLD
INTEREXCHANGE TELECOMMUNICATIONS
SERVICE IN ARIZONA AND FOR
COMPETITIVE CLASSIFICATION OF ITS
SERVICES.

DOCKET NO. T-04014A-01-0340

DECISION NO. _____

OPINION AND ORDER

11 DATE OF HEARING: July 17, 2002

12 PLACE OF HEARING: Phoenix, Arizona

13 ADMINISTRATIVE LAW JUDGE: Philip J. Dion III

14 APPEARANCES: Mike Patten, ROSHKA HEYMAN & DEWULF, PLC,
on behalf of KMC Data, L.L.C.

15
16 Maureen A. Scott, Staff Attorney, Legal Division, on
behalf of the Utilities Division of the Arizona
17 Corporation Commission.

18 **BY THE COMMISSION:**

19 Having considered the entire record herein and being fully advised in the premises, the
20 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

21 **FINDINGS OF FACT**

22 1. On April 16, 2001, KMC Data, L.L.C. ("KMC" or "Applicant") filed with the
23 Commission an application for a Certificate of Convenience and Necessity ("Certificate") to provide
24 competitive facilities-based and resold local exchange, and resold interexchange telecommunications
25 services statewide.

26 2. On October 30, 2001, Applicant docketed a Notice of Filing of Affidavits of
27 Publication that comply with Commission rules.

28 3. KMC is a Delaware "C" corporation, authorized to do business in Arizona. KMC is a

1 wholly owned subsidiary of KMC Data Holdco, L.L.C. KMC Data Holdco, L.L.C is wholly owned
2 by KMC Telecom Holdings, Inc. Therefore, KMC's ultimate parent is KMC Telecom Holdings,
3 Inc.

4 4. On March 29, 2002, the Commission's Utilities Division Staff ("Staff") filed its Staff
5 Report, which recommended approval of the application and included a number of additional
6 recommendations.

7 5. On May 7, 2002, a Procedural Order was issued setting this matter for hearing on July
8 17, 2002 and setting various procedural deadlines.

9 6. On July 17, 2002, a full public hearing in this matter was held as scheduled. Applicant
10 appeared telephonically and was represented by counsel. Staff appeared and was represented by
11 counsel. The hearing was conducted before a duly authorized Administrative Law Judge. Evidence
12 was presented and testimony was taken. At the conclusion of the hearing, the Administrative Law
13 Judge took the matter under advisement and informed the parties that a Recommended Opinion and
14 Order would be prepared for the Commissioners' consideration.

15 7. Applicant has the technical capability to provide the services that are proposed in its
16 application.

17 8. Currently there are several incumbent providers of local exchange and interexchange
18 services in the service territory requested by Applicant, and numerous other entities have been
19 authorized to provide competitive local and interexchange services in all or portions of that territory.

20 9. It is appropriate to classify all of Applicant's authorized services as competitive.

21 10. The Staff Report stated that Applicant has no market power and the reasonableness of
22 its rates would be evaluated in a market with numerous competitors.

23 11. According to Staff, KMC submitted the unaudited financial statement of its parent,
24 KMC Telecom Holdings, Inc. for the year ending December 31, 2000. These financial statements list
25 assets of \$1.3 billion, negative equity of \$284.3 million, and a net loss of \$454.1 million.

26 12. The Application states that KMC collects advances and deposits from its customers.

27 13. Staff recommends that KMC's application for a Certificate to provide competitive
28 facilities-based and resold local exchange and resold interexchange telecommunications services be

1 granted subject to the following conditions:

- 2 (a) that, unless it provides services solely through the use of its own facilities,
3 KMC be ordered to procure an Interconnection Agreement, within 365 days of
4 the effective date of the Order in this matter or 30 days prior to the provision of
5 service, whichever comes first, that must remain in effect until further order of
6 the Commission, before being allowed to offer local exchange service;
- 7 (b) that KMC be ordered to file with the Commission, within 365 days of the
8 effective date of the Order in this matter or 30 days prior to the provision of
9 service, whichever comes first, its plan to have its customers' telephone
10 numbers included in the incumbent's Directories and Directory Assistance
11 databases;
- 12 (c) that KMC be ordered to pursue permanent number portability arrangements
13 with other LECs pursuant to Commission rules, federal laws and federal rules;
- 14 (d) that KMC be ordered to abide by and participate in the AUSF mechanism
15 instituted in Decision No. 59623, dated April 24, 1996 (Docket No. RT-T-
16 03905A-00-0513E-95-0498);
- 17 (e) that KMC be ordered to abide by the quality of service standards that were
18 approved by the Commission for USWC in Docket No. T-0151B-93-0183;
- 19 (f) that in areas where it is the sole provider of local exchange service facilities,
20 KMC be ordered to provide customers with access to alternative providers of
21 service pursuant to the provisions of Commission rules, federal laws and
22 federal rules;
- 23 (g) that KMC be ordered to certify, through the 911 service provider in the area in
24 which it intends to provide service, that all issues associated with the provision
25 of 911 service have been resolved with the emergency service providers within
26 365 days of an Order in this matter or 30 days prior to the provision of service,
27 whichever comes first, which certification must remain in effect until further
28 Order of the Commission;
- (h) that KMC be ordered to abide by all the Commission decisions and policies
regarding CLASS services;
- (i) that KMC be ordered to provide 2-PIC equal access;
- (j) that KMC be required to notify the Commission immediately upon changes to
its address or telephone number;
- (k) that KMC be ordered to comply with all Commission rules, orders, and other
requirements relevant to the provision of intrastate telecommunications
service;
- (l) that KMC be ordered to maintain its accounts and records as required by the
Commission;
- (m) that KMC be ordered to file with the Commission all financial and other
reports that the Commission may require, and in a form and at such times as
the Commission may designate;

- 1 (n) that KMC be ordered to maintain on file with the Commission all current
2 tariffs and rates, and any service standards that the Commission may require;
3 (o) that KMC be ordered to cooperate with Commission investigations of
4 customer complaints; and
5 (p) KMC be ordered to participate in and contribute to a universal service fund, as
6 required by the Commission.

7 15. Staff further recommended that KMC's application for a CC&N to provide intrastate
8 telecommunications services should be granted subject to the following conditions:

- 9 (a) KMC be ordered to file conforming tariffs within 365 days from the date of an
10 Order in this matter or 30 days prior to providing service, whichever occurs
11 first, and in accordance with the Decision;
12 (b) In order to protect KMC's customers:
13 (1) KMC should be ordered to procure a performance bond equal to \$135,000.
14 The minimum bond amount of \$135,000 should be increased if at any time
15 it would be insufficient to cover prepayments or deposits collected from
16 KMC's customers. The bond amount should be increased in increments of
17 \$67,500 whenever the total amount of the advances, deposits and
18 prepayments is within \$13,500 of the bond amount;
19 (2) if KMC desires to discontinue service, it should be required to file an
20 application with the Commission pursuant to A.A.C. R14-2-1107;
21 (3) KMC should be required to notify each of its local exchange customers and
22 the Commission 60 days prior to filing an application to discontinue
23 service pursuant to A.A.C. R14-2-1107; and any failure to do so should
24 result in forfeiture of the Applicant's performance bond;
25 (4) KMC should docket proof of the performance bond within 365 days of the
26 effective date of an Order in this matter or 30 days prior to the provision of
27 service, whichever comes first, and must remain in effect until further
28 Order of the Commission;
(5) if, at some time in the future, KMC does not collect from its customers an
advance, deposit and/or prepayments, Staff recommends that KMC be
allowed to file a request for cancellation of its established performance
bond. Such request should be filed with the Commission for Staff review.
Upon receipt of such filing and after Staff review, Staff will forward its
recommendation to the Commission; and
(c) If any of the above timeframes are not met, that KMC's CC&N should become
null and void without further Order of the Commission and no extensions for
compliance should be granted.

16. In its Staff Report, Staff stated that based on information obtained from the Applicant, it has determined that KMC's fair value rate base is zero¹, and is too small to be useful in setting rates. Staff further stated that in general, rates for competitive services are not set according to rate of return regulation, but are heavily influenced by the market. Staff recommended that the Commission not set rates for KMC based on the fair value of its rate base.

17. The rates to be ultimately charged by KMC will be heavily influenced by the market. Because of the nature of the competitive market and other factors, a fair value analysis is not necessarily representative of the company's operations.

18. Staff stated that KMC lacks the market power to adversely affect the telecommunications market by either restricting output or raising prices. Also, Staff has recommended that KMC's services be classified as competitive and thus subject to the flexible pricing authority allowed by the Commission's Competitive Telecommunications Services rules. Staff believes that these two factors, lack of market power and the competitive marketplace for the services KMC proposes to offer, support the conclusion that a fair value analysis is not necessarily representative of the company's operations, and that the rates charged by KMC will be reasonable.

19. Staff's recommendations, as set forth herein, are reasonable.

20. KMC's fair value rate base is determined to be zero for purposes of this proceeding.

CONCLUSIONS OF LAW

1. Applicant is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

2. The Commission has jurisdiction over Applicant and the subject matter of the application.

3. Notice of the application was given in accordance with the law.

4. A.R.S. § 40-282 allows a telecommunications company to file an application for a Certificate to provide competitive telecommunications services.

¹ At the hearing, Randy Meecham, a manager of State and Government Affairs for KMC, explained that currently the particular business unit of KMC that would conduct business pursuant to the Certificate, if granted, is not currently operational as KMC has experienced delays in product roll-out and due to capital constraints that the industry is experiencing.

5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised Statutes, it is in the public interest for Applicant to provide the telecommunications services set forth in its application.

6. Applicant is a fit and proper entity to receive a Certificate authorizing it to provide competitive facilities-based and resold local exchange and resold interexchange telecommunications services in Arizona as conditioned by Staff's recommendations.

7. The telecommunications services that the Applicant intends to provide are competitive within Arizona.

8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules, it is just and reasonable and in the public interest for Applicant to establish rates and charges that are not less than the Applicant's total service long-run incremental costs of providing the competitive services approved herein.

9. Staff's recommendations, as set forth herein, are reasonable and should be adopted.

10. KMC's competitive rates, as set forth in its proposed tariffs, are just and reasonable and should be approved.

ORDER

IT IS THEREFORE ORDERED that the application of KMC Data, L.L.C. for a Certificate of Convenience and Necessity for authority to provide competitive facilities-based and resold local exchange, and resold interexchange telecommunications services in Arizona shall be, and is hereby, granted, conditioned upon KMC Data, L.L.C.'s timely compliance with the following three Ordering Paragraphs.

IT IS FURTHER ORDERED that KMC Data, L.L.C. shall file conforming tariffs in accordance with this Decision within 365 days of this Decision or 30 days prior to providing service, whichever comes first.

IT IS FURTHER ORDERED that KMC Data, L.L.C. shall procure a performance bond equal to \$135,000 the earlier of 365 days from the effective date of this Order or 30 days prior to the commencement of service. The minimum bond amount of \$135,000 shall be increased if, at any time, it would be insufficient to cover prepayments or deposits collected from the Applicant's

1 customers. The bond amount shall be increased in increments of \$67,500. This increase shall occur
 2 when the total amount of the advances, deposits, and prepayments is within \$13,500 of the bond
 3 amount.

4 IT IS FURTHER ORDERED that KMC Data, L.L.C. shall comply with all of the Staff
 5 recommendations set forth in the above-stated Findings of Fact and Conclusions of Law.

6 IT IS FURTHER ORDERED that if KMC Data, L.L.C. fails to meet the timeframes outlined
 7 in the Ordering Paragraphs above, that the Certificate of Convenience and Necessity conditionally
 8 granted herein shall become null and void without further Order of the Commission.

9 IT IS FURTHER ORDERED that if KMC Data, L.L.C. fails to notify each of its customers
 10 and the Commission at least 60 days prior to filing an application to discontinue service pursuant to
 11 A.A.C. R14-2-1107, that in addition to voidance of its Certificate of Convenience and Necessity,
 12 KMC Data, L.L.C.'s performance bond shall be forfeited.

13 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

14 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

15
 16 CHAIRMAN

COMMISSIONER

COMMISSIONER

17
 18 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
 19 Secretary of the Arizona Corporation Commission, have
 20 hereunto set my hand and caused the official seal of the
 Commission to be affixed at the Capitol, in the City of Phoenix,
 this ____ day of _____, 2002.

21 _____
 22 BRIAN C. McNEIL
 23 EXECUTIVE SECRETARY

24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000

1 SERVICE LIST FOR: KMC DATA, L.L.C.

2 DOCKET NO.: T-04014A-01-0340

3

4 Mike Duke
5 Director of Government Affairs
6 KMC TELECOM HOLDINGS, INC.
1755 North Brown Road
Lawrenceville, Georgia 30043

7 KMC DATA, L.L.C.
8 1545 Route 206, Suite 300
Bedminster, New Jersey 07921-2567

9

10 Michael Patten
ROSHKA HEYMAN & DEWULF, PLC
Two Arizona Center
11 400 North 5th Street, Ste. 1000
12 Phoenix, AZ 85004-3906
Attorneys for KMC Data L.L.C.

13

14 Christopher Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
15 1200 West Washington Street
Phoenix, Arizona 85007

16

17 Ernest Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
18 1200 West Washington Street
Phoenix, Arizona 85007

19

20

21

22

23

24

25

26

27

28